Filed 5/16/19 In re D.S. CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| In re D.S. et al., Persons Coming Under the Juvenile Court Law. | B293557<br>(Los Angeles County Super. Ct. No. 18CCJP04588) |
| LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>K.L. et al.,<br><br>Defendants and Appellants. | |

APPEAL from findings and orders of the Los Angeles Superior Court, Natalie P. Stone, Judge. Affirmed.

Donna B. Kaiser, under appointment by the Court of Appeal, for Defendant and Appellant K.L.

Paul A. Swiller, under appointment by the Court of Appeal, for Defendant and Appellant Y.S.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Kimberly Roura, Deputy County Counsel for Plaintiff and Respondent.

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In this juvenile dependency case, the mother and father challenge the juvenile court's exertion of dependency jurisdiction over their five-year-old twin boys, its order removing them from their custody, and the requirement in their reunification plans that their "marijuana levels not . . . be excessive." Father also challenges the court's order allowing only for monitored visitation. We conclude there is no reversible error with respect to any of these errors and affirm.

## FACTS AND PROCEDURAL BACKGROUND

### I. Facts

K.L. (mother) and Y.S. (father) have two children together—identical twins Dayne and Bayne.[1]

Both parents suffer from mental illness. Mother is bipolar and also suffers from manic depression and anxiety. Mother has seizures multiple times each week. Father is bipolar and schizophrenic, and also suffers from depression and post-

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1 Mother also has two other children from prior relationships, Zayne and Kayne, but they are not part of this case.

traumatic stress disorder. Neither father nor mother takes any prescribed medications for these illnesses; instead, they self-medicate with marijuana.

In June 2018, the Los Angeles County Department of Children and Family Services (the Department) received complaints that the parents were trafficking in drugs and that their apartment smelled strongly of marijuana. Social workers visited their apartment on two separate occasions. Although neither parent appeared to be under the influence on either occasion, each parent freely admitted to regularly using marijuana. Mother said they would "take turns" so that one of them was always sober, but mother later admitted that father watches the children while using marijuana and father said that marijuana "does not impair him" and that he is "totally" fine watching the kids while high.

Neither child had any marks or bruises, but each was developmentally behind and unsanitary. Bayne suffered from a "global developmental delay" because, at nearly five years old, he could intelligibly speak only three words and was otherwise unable to communicate with words. As a result, Bayne was aggressive toward other children, including Dayne. He was also "indiscriminately social," a behavior "see[n] in children with . . . poor caregiving as a means to get their needs met." Dayne could communicate with words, but his speech was "difficult to understand." Dayne was also "indiscriminately social" and took on a parental role vis-à-vis his brother, and both attributes "may have been adaptive in his birth home." Both children were "at risk for delays" in four of five development categories--namely, communication, fine motor, problem solving, and personal/social skills. Both children were "overweight," and Bayne was

"borderline obese." The children were "unkempt" and smelled of urine; their mattresses reeked of urine and feces.

In late June 2018, mother and father tested positive for marijuana, methamphetamine and amphetamine. Mother admitted to using methamphetamine from her early teen years until age 27, six years earlier. Father had a 2001 misdemeanor conviction for possessing a controlled substance.

Mother and father denied that the children had any speech problems. They denied having an unclean apartment. They denied using methamphetamine. Father denied having a criminal history. And mother initially denied having any mental health problems.

## II. Procedural History

In July 2018, the Department filed a petition asking the juvenile court to exert dependency jurisdiction over Bayne and Dayne due to (1) mother's and father's "history of substance abuse including marijuana" and each parent's "recent abuse[] of methamphetamine, amphetamine and marijuana," each of which "render[ed]" the parents "incapable of providing regular care of the children"; (2) mother's and father's "mental and emotional problems," including father's diagnoses of schizophrenia, bipolar disorder, depression and post-traumatic stress disorder and mother's diagnoses of bipolar disorder, manic depressive disorder, and anxiety, which rendered each parent "unable to provide regular care and supervision of the children"; and (3) the "filthy and unsanitary condition" of the children's home.[2] As a result of

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2 The juvenile court interlineated a few of the allegations before sustaining them. The allegations set forth in the text are the allegations as interlineated.

these allegations, the Department alleged, the children were placed at substantial risk of serious bodily injury, thereby warranting the exercise of dependency jurisdiction under Welfare and Institutions Code section 300, subdivision (b)(1).[3]

The juvenile court held a joint jurisdictional and dispositional hearing in October 2018. Ultimately, the court sustained the jurisdictional allegations regarding the parents' substance abuse and mental and emotional problems. More specifically, the court found that the parents' "methamphetamine use, their marijuana use, and their mental health issues" "impaired" their "judgment," such that they did not seek "intervention for their children's [developmental] delays," which has led to Bayne's inability to speak and his aggressive behavior, to Dayne's "parentified" behavior in "tak[ing] care" of Bayne, and to both kids being "way, way behind" developmentally. The court struck the unsanitary home count as a "stand-alone count." The court also removed the children from the parents, finding that the parents' recent methamphetamine use made it "premature to release the children to the parents" and that "the Department [had] made reasonable efforts to prevent removal." The court then ordered reunification services as well as case plans for each parent that, among other things, (1) ordered that each parent's "marijuana levels" should "not . . . be excessive," and (2) ordered that the parents' weekly visitation with the children be monitored.

Mother and father filed timely appeals.

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3 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

## DISCUSSION

### I. Jurisdiction

Both mother and father argue that the juvenile court's jurisdictional findings are not supported by the record. A juvenile court may exert dependency jurisdiction under section 300, subdivision (b)(1) if, among other things, "there is a substantial risk that [a] child will suffer[] serious physical harm or illness[] as a result of . . . the inability of [the] parent . . . to provide regular care for the child due to the parent's or guardian's mental illness . . . or substance abuse." (§ 300, subd. (b)(1).) In evaluating whether a juvenile court's jurisdictional findings are supported by the record, we ask only whether "substantial evidence, contradicted or uncontradicted, supports" those findings. (*In re I.J.* (2013) 56 Cal.4th 766, 773.) In so doing, we consider the record as a whole, and resolve all conflicts and draw all reasonable inferences to support the juvenile court's findings; we do not reweigh the evidence. (*In re Lana S.* (2012) 207 Cal.App.4th 94, 103.)

In this case, it is factually undisputed that mother and father each suffer from mental illness. It is also factually undisputed that mother and father regularly use marijuana, that they each tested positive on one occasion for methamphetamines, and that the juvenile court specifically rejected parents' argument that their positive test results for methamphetamine were wrong.

It is legally undisputed that neither mental illness nor substance use *alone* is sufficient to invoke dependency jurisdiction. (*In re A.L.* (2017) 18 Cal.App.5th 1044, 1050 [mental illness alone insufficient]; *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003 [substance abuse alone insufficient].) It is also legally

undisputed that, to warrant the exertion of dependency jurisdiction, there must *also* be a "nexus" between the mental illness or drug use and the "failure to ensure [that the children] were safely cared for and supervised." (*In re Natalie A.* (2015) 243 Cal.App.4th 178, 185.)

Substantial evidence supports the juvenile court's finding that parents' drug use and mental illness resulted in lapses in care that place the children at substantial risk of serious physical harm. Psychologists evaluating the children found that both Bayne and Dayne were lagging behind developmentally on several fronts, that Bayne had severe speech difficulties and regularly threw objects and hit Dayne, and that both children were socially indiscriminate; the psychologists opined that these attributes are often present in children whose parents are inattentive to their needs. The children's bodies also reeked of urine and their beds smelled of urine and feces, placing them at risk of illness. Not only did mother and father not tend to these developmental and hygienic issues; they denied they existed at all, insisting that neither child had a speech problem and that all sanitation issues were due to a sewage problem with their apartment or to potty training in progress. (*In re A.F.* (2016) 3 Cal.App.5th 283, 293 ["[D]enial is a factor often relevant to determining whether persons are likely to modify their behavior in the future without court supervision."]; *In re Gabriel K.* (2012) 203 Cal.App.4th 188, 197 ["One cannot correct a problem one fails to acknowledge."].) Thus, substantial evidence supports the juvenile court's finding that the parents' substance abuse and mental illness led to neglect of the children's needs, which placed the children at risk of serious physical harm or illness due to Bayne's outbursts as well as unhygienic living conditions.

Mother and father raise what boil down to five arguments to the contrary.

First and foremost, they argue that the Department's petition is no different from a petition the Department brought on the same grounds in 2014, and which this court ruled was unsupported by sufficient evidence. (*In re D.S.*, (June 25, 2015, B258954) [nonpub. opn.].) We disagree. In the prior appeal, we ruled that the Department had not adduced any evidence that the parents' mental illnesses or abuse of marijuana placed the then-one-year-old children at risk. Things have changed. Now, there is evidence that the parents used methamphetamine as well as marijuana. More to the point, now there is evidence of tangible harm to the children as a result of parents' drug use and mental illness—namely, the children's developmental delays and unsanitary hygiene. The evidentiary void has been filled.

Second, the parents contend that there is no "nexus" between their mental illness and drug use on the one hand, and the children's developmental delays[4] on the other, because the former did not "definitively" cause the latter. This misunderstands the "nexus" requirement. Contrary to what parents imply, the causal chain can have more than one link. Two links is sufficient, and that is what we have here: The parents' mental illness and substance abuse caused them to be neglectful, and that neglect led to the children's developmental delays and their unsanitary hygiene. (Accord, *In re R.R.* (2010)

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4 For the first time in her reply brief, mother attacks the assessment of the children as being developmentally behind. Not only are her attacks procedurally improper (*In re Karla C.* (2010) 186 Cal.App.4th 1236, 1269), they merely register disagreement with the assessment without any evidentiary basis.

187 Cal.App.4th 1264, 1284 [parents' drug use leading to "compromised ability to care for [a] child" can support jurisdiction]; *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1651 [parents' mental illness leading to neglect can support jurisdiction]; cf. *In re Joaquin C.* (2017) 15 Cal.App.5th 537, 561-562 [same].) Father cites a number of cases he says support his position, but each of them involved parents whose mental illness or substance abuse did not result in neglect that caused the children any harm or placed them at risk of any harm. (*In re David M.* (2005) 134 Cal.App.4th 822, 830 [parents had drug and mental health issues, but "uncontradicted" "evidence" showed that the child "was healthy, well cared for, and loved" and the mother and father were "raising him in a clean, tidy home"]; *In re Jamie M.* (1982) 134 Cal.App.3d 530, 542 [mother had mental health issues, but children were "healthy and normal"]; *In re A.G.* (2013) 220 Cal.App.4th 675, 684-685 [mother had mental health issues, but father capable of caring for children].) Father also claims that he and mother would "continue" services for the children, "especially" if prompted by specialists; however, there is no evidence that the parents ever sought even minimal services to address the children's developmental delays, and there *is* evidence that the parents denied all evidence of those delays and that father refused to cooperate with any efforts to provide services absent a court order.

Third, both parents assert that they are "substance *users*," but not "substance *abusers*" within the meaning of *In re Drake M.* (2012) 211 Cal.App.4th 754, 766-767 (*Drake M.*). *Drake M.* held that a parent engages in "substance *abuse*" only if (1) a medical professional has diagnosed the parent as having a substance abuse problem, or (2) the parent's substance abuse meets the

definition of a substance abuse problem as defined by the Diagnostic and Statistical Manual of Mental Disorders (DSM). (*Id.* at p. 766, italics added.) To begin, we need not reach this issue because the mental illness counts are independently sufficient to sustain jurisdiction. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.) Further, we join several other courts in declining to follow *Drake M.* to the extent it purports to require such a showing in every case. (*In re Rebecca C.,* (2014) 228 Cal.App.4th 720, 726; *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1218.) And the evidence presented in this case satisfies *Drake M.*'s second showing in any event because the DSM's definition reaches the "failure to fulfill major role obligations at work, school, or home" (*Natalie A.*, *supra*, 243 Cal.App.4th at p. 185), and the failure to fulfill a major role obligation at home includes "neglect of children or [the] household" (*ibid.*). Here, there is evidence that both mother and father neglected the children, thereby satisfying *Drake M.*'s definition of "substance abuse."

Fourth, both parents point us to evidence that they believe weighs in their favor on the jurisdictional findings, including that the children had no marks or bruises; that other observers said the children were well cared for; that the parents said they were able to perfectly time their drug use, mental illness episodes and seizures so that one parent was sober and coherent at all times; that the parents only had one positive test for methamphetamine; that the parents had good reasons for the children's unsanitary living conditions and hygiene; that the parents had been married for a while and had a strong network of friends; that they were not informed that the children were developmentally behind by "someone *with expertise*"; and that the

Department did not make sufficient efforts to contact and talk with some of that network. At bottom, the parents are asking us to give this above stated evidence more weight than the contrary evidence the juvenile court found to be more persuasive. This we may not do. (*In re Lana S.*, *supra*, 207 Cal.App.4th at p. 103.)

Lastly, mother argues that the juvenile court erred in relying in part on the "chemical smell" of their apartment to support its finding that the positive drug tests for methamphetamine were accurate because the court sustained father's objection to that hearsay evidence under section 355. The juvenile court did sustain father's section 355 objection to this evidence, but section 355 provides only that "the specific hearsay evidence shall not be sufficient *by itself* to support a jurisdictional finding." (§ 355, subd. (c)(1), italics added.) Here, the court's finding that the test results were accurate rested not only on the "chemical smell," but also on the parents' admitted history of using methamphetamines and the fact that mother and father tested positive on two different days at a lab that was, in the juvenile court's view, the "gold standard" for drug testing.

**II. Removal**

Both mother and father also argue that the trial court erred in removing Dayne and Bayne from their custody. A juvenile court may remove a child from [his] parents only after finding, by clear and convincing evidence, that (1) "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the [child] if [he was] returned home," and (2) "there are no reasonable means" short of removal "by which the [child's] physical health can be protected." (§ 361, subd. (c)(1).) We review a removal order for substantial evidence (*In re R.T.* (2017) 3 Cal.5th 622, 633),

although the courts remain divided over whether we do so through the lens of clear and convincing evidence. (Compare *In re Ashly F.* (2014) 225 Cal.App.4th 803, 809 [applying clear and convincing evidence to substantial evidence review on appeal] with *In re J.S.* (2014) 228 Cal.App.4th 1483, 1492-1493 [disregarding clear and convincing evidence standard on appeal].) We will sidestep this conflict by using the more parent-friendly lens of clear and convincing evidence.

Substantial evidence supports the juvenile court's removal order. Substantial evidence supports a finding, by clear and convincing evidence, that Dayne and Bayne would face a substantial danger to their health and safety if returned home. The juvenile court's jurisdictional finding already constitutes a finding, by a preponderance of the evidence, that the children are at substantial risk of serious physical harm. Both parents' drug use and mental illness, the resulting neglect that has ripened into developmental delays and significant lapses in hygiene, and the parents' refusal to acknowledge these delays and lapses provided ample basis to conclude, by clear and convincing evidence, that returning the children to mother's and father's care would be dangerous. Substantial evidence also supports a finding, by clear and convincing evidence, that no reasonable means short of removal would protect the children. At the jurisdictional and dispositional hearing, the parents' attorneys offered up several alternatives to removal including individual counseling, random drug testing, and unannounced visits. In issuing the removal order, the juvenile court necessarily rejected those alternatives and substantial evidence supported that rejection in light of the parents' refusal to acknowledge any deficiencies in their parenting, each parents' less-than-perfect

attendance at drug tests, and father's proclamation that he would not participate in any programs unless and until ordered to do so.

Parents make what amount to three arguments to the contrary.

First, they argue that there were means short of removal that could have protected the children, such as sending the parents to parenting-classes, having the parents do random drug testing, or buying mattress covers for the kids' beds. The juvenile court considered these options but found them wanting. Parents had undergone parenting classes in the prior dependency case and mother had even completed the class, but parents still subsequently neglected the children. The court had already ordered random drug tests, but each parent had missed some of those tests. And the court was within its discretion to give weight to father's trenchant refusal to participate in any program unless ordered to do so. Mother also cites several cases she claims are analogous, but we conclude they are inapt. (*In re Henry V.* (2004) 119 Cal.App.4th 522, 529-530 [removal not warranted when juvenile court did not indicate it made findings by clear and convincing evidence, and did not explore options short of removal]; *In re Jeannette S.* (1979) 94 Cal.App.3d 52, 60 [removal not warranted in a case involving an unsanitary house].)

Second, the parents argue that the juvenile court made a procedural error because it was required, by section 361, subdivision (e), to "make a determination as to whether reasonable efforts were made to prevent . . . the need for removal" and to "state the facts on which [its] decision to remove . . . [was] based." The court tersely stated, "The Department made reasonable efforts to prevent removal." This statement did not

comply with section 361, subdivision (e), but the court's failure to make findings was not prejudicial. (Accord, *In re S.G.* (2003) 112 Cal.App.4th 1254, 1261.) That is because father and mother told the Department that they would not cooperate with any programs or plans unless ordered to do so; in light of this unwillingness, the Department's failure to undertake further efforts dependent upon their cooperation was necessarily harmless. Mother also cites to section 366.26, subdivision (c)(2) and cases based thereon, but that provision is irrelevant because it addresses the requirement that the Department provide reasonable services prior to the termination of parental rights.

Lastly, father argues that the juvenile court impermissibly removed the children from him due to a failure to "internalize[]" parenting skills, a basis found insufficient to warrant removal in *In re Jasmine G.* (2000) 82 Cal.App.4th 282, 289-290. Father is wrong. The juvenile court's removal order had nothing to do with the failure to internalize parenting skills; to the contrary, the court removed the children due to the dangers posed by father's neglect of their special needs.

## III. Case Plan

The parents either collectively or individually challenge two aspects of the juvenile court's case plan for reunification. A juvenile court may make "any reasonable orders to the parents . . . of [a] child" over whom it exerts jurisdiction "as the court deems necessary and proper." (§ 362, subd. (d).)

### A. *Challenge to drug testing requirement*

Both parents argue that the portion of their case plans requiring that their marijuana levels "not . . . be excessive" is so vague as to violate due process. Whether a condition is too vague to inform a parent what he or she must do to regain custody of

their child is a question of law we review de novo. (*In re Sheena K.* (2007) 40 Cal.4th 875, 888; *In re Kristin W.* (1990) 222 Cal.App.3d 234, 255.)

We reject the parents' vagueness challenge for two reasons.

First, parents did not object to the juvenile court's condition at the time, thereby depriving the juvenile court of the ability to specify a more precise definition of "excessive" "levels."[5] Allowing them to raise this objection now would permit them to "trifle with the courts." This is not allowed. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338-1339.)

Second, even if we considered parents' challenge on the merits, it fails. That is because we must consider the court's order in context. (See *People v. Forrest* (2015) 237 Cal.App.4th 1074, 1080 [doing so, in context of probation conditions].) Here, the parents' lab results set forth the levels of marijuana in mother's and father's blood over several tests and, in so doing, set forth a range. What is more, mother's attorney asserted without objection that mother's results in the 600 to 800 milliliters per nanogram range were "not extremely high." With the fixed range as a background and counsel's commentary as a barometer, we cannot say that the parties were uninformed as to what marijuana levels were deemed to be "high" and thus, which were deemed to be "excessive." (Accord, *Smith v. Peterson* (1955) 131 Cal.App.2d 241, 250 ["[T]he word[] 'excessive' . . . when viewed in the context in which [it] is used [is] sufficiently certain to inform

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**5** Father contends that he raised this objection at the hearing by arguing that his marijuana use did not endanger the children, but those arguments were made before the juvenile court ordered that the parents' marijuana levels not be "excessive" and thus cannot have contested that order's vagueness.

persons of ordinary intelligence of the nature of the offense which is prohibited."].) That the parties all understood when a level became "excessive" is confirmed by the absence of any contemporaneous objection or request for clarification.

**B. *Father's challenge to monitored visitation***

Father argues that the trial court erred in requiring his visitation with the children to be monitored. When a juvenile court removes a child from his parent with the eventual goal of reunifying the family, the juvenile court should provide for visitation between the parent and child "consistent with the well-being of the child" unless doing so will "jeopardize the safety of the child." (§ 362.1, subds. (a)(1) & (a)(1)(B).) We review a trial court's order regarding visitation for an abuse of discretion. (*In re J.P.* (2017) 14 Cal.App.5th 616, 624.)

The juvenile court did not abuse its discretion in ordering that father's visits with the children be monitored. In balancing the best interests of the children in avoiding further neglect against the children's safety, the juvenile court reasonably concluded that the harm to the children from father's inattentiveness warranted monitored supervision until such time as he demonstrated progress in being more responsive to the children's needs (and thereby assuring their safety). Father disagrees with the trial court's balancing, but this falls short of establishing an abuse of discretion. Father also urges that requiring visitation to be monitored is akin to a complete denial of visitation, and thus subject to greater appellate scrutiny; father offers no precedent in support of his proffered equivalency, and we decline to create it.

**DISPOSITION**

The findings and orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST